

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SEA PRESTIGIO, LLC, a Delaware
limited liability company,

Plaintiff,

v.
M/Y TRITON, et al.,

Defendants.

Case No. 10cv2412-BTM (AJB)

**ORDER RE APPLICATION TO
STAY ACTION**

Defendants move to stay the instant action. For the following reasons,
Defendants' application is **GRANTED**.

I. BACKGROUND

On June 30, 2010, the parties executed a loan agreement whereby Plaintiff Sea Prestigio, LLC, would loan Defendants \$21 million in two disbursements. Defendants executed a promissory note in the principal sum of \$21 million concurrently with the loan agreement. To secure payment, Defendants granted Plaintiff a preferred ship's mortgage on the M/Y TRITON ("the vessel"), a 163-foot yacht, which would allow Plaintiff to take possession of the vessel in the event of default. On June 30, 2010, Plaintiff paid the first \$15.5 million disbursement into an escrow account. The second \$5.5 million disbursement was not made. The parties' dispute centers on this non-payment.

On October 27, 2010, FBP Investments, LP, Spearfish Ventures, Ltd., and Cochal investments, S. de R.L. de C.V. – Defendants in the instant case – filed a complaint

1 against Sea Prestigio, et al., in Orange County Superior Court, alleging state law claims
2 for usury, breach of contract, breach of covenant of good faith and fair dealing, inducing
3 breach of contract/fraud, intentional interference with contractual relations, false promise,
4 and various declaratory relief claims (“the state action”). Sea Prestigio and the other
5 state defendants removed the state action to the United States District Court for the
6 Central District of California under 28 U.S.C. § 1333, on the ground that federal district
7 courts have exclusive jurisdiction over admiralty or maritime cases. (Def. Ex. B at 5-6)
8 On January 31, 2011, Judge Cormac J. Carney of the Central District of California
9 ordered the case remanded to state court, holding that “the principal objective of the
10 contract is borrowing \$21 million” and that “[t]he fact that the collateral for Plaintiffs’ loan
11 happens to include a yacht, together with other collateral, does not mean that the loan
12 agreement furthers or affects maritime commerce.” (Def. Ex. C)

13 Approximately one month after the state action was filed, on November 23, 2010,
14 Plaintiff Sea Prestigio, LLC, filed an action before this Court, bringing claims for breach of
15 contract and for foreclosure of the vessel and other property used to secure the loan (“the
16 federal action”). The next day, the Court granted Plaintiff’s ex parte application for an
17 order authorizing issuance of a warrant for arrest of the vessel, and on December 22,
18 2010, the Court denied Defendants’ motion to vacate the order of arrest.

II. DISCUSSION

Defendant argues that, pursuant to the *Colorado River* abstention doctrine, this Court should stay this action pending resolution of the state action. Although Federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them,” *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), the Ninth Circuit has commented that this statement “somewhat overstates the law because in certain circumstances, a federal court may stay its proceedings in deference to pending state proceedings.” *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989).

Under the *Colorado River* abstention doctrine, a federal district court may abstain when there are concurrent state and federal lawsuits and when abstaining promotes

1 “[w]ise judicial administration, giving regard to conservation of judicial resources and
 2 comprehensive disposition of litigation.” *Colorado River*, 424 U.S. at 817 (quotation and
 3 citation omitted); see also *Moses H. Cone Memorial Hosp. v. Mercury Center*, 460 U.S. 1,
 4 14-15 (1983). The Ninth Circuit summarized the following non-exhaustive list of factors,
 5 previously identified by both the Supreme Court and the Ninth Circuit, that should
 6 be considered and balanced in determining whether abstention is appropriate: (1)
 7 jurisdiction over property, (2) the inconvenience of the federal forum, (3) avoiding
 8 piecemeal litigation, (4) the order in which the concurrent forums obtained jurisdiction, (5)
 9 whether federal law provides the rule of decision on the merits, (6) whether the state court
 10 proceedings are inadequate to protect the federal litigant’s rights, and (7) the prevention
 11 of forum shopping. *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1367-68 (9th Cir.
 12 1990). “These factors are to be applied in a pragmatic and flexible way, as part of a
 13 balancing process rather than as a mechanical checklist.” *Nakash*, 882 F.2d at 1415
 14 (quotation and citations omitted).

15 **A. Evaluation Of The Abstention Factors**

16 As a threshold matter, the Court looks to whether the state and federal actions are
 17 “substantially similar.” *Fierle v. Jorge Perez, Md Ltd.*, 350 Fed. Appx. 140, 141 (9th Cir.
 18 2009) (quoting *Nakash*, 882 F.2d at 1416). This threshold is clearly met. As correctly
 19 stated by Plaintiff in the notice of removal in the state action, “[T]he Southern District
 20 Action and the removed State Court Action . . . are comprised of the same issues, will
 21 have the same parties and witnesses, and are essentially the same case.” (Def. Ex. B at
 22 5-6)

23 Turning to the abstention factors, the Court finds that several weigh in favor
 24 staying the federal action. First, staying the federal action would prevent the duplication
 25 of efforts and the risk of inconsistent outcomes that might result from the piecemeal
 26 litigation of the parties’ dispute. As conceded by Plaintiff in the state action notice of
 27 removal, the issues in these case are essentially the same. Both the state and federal
 28 actions are focused on the loan agreement, with both parties contending that the other

1 breached the agreement, raising a substantial issue of state law. Indeed, the only federal
 2 claim at issue – Plaintiff’s claim for foreclosure of the vessel pursuant to 46 U.S.C. §
 3 31325 – itself is derivative of a finding that Defendants are in “default of any term of the
 4 preferred mortgage.” § 31325(b). The preferred ship mortgage, in turn, lists “default
 5 under the Loan Agreement” as an event of default. (Compl. Ex. D at 8) Thus, there is a
 6 substantial likelihood that a judgment in the state action could resolve the federal
 7 question of foreclosure over the vessel.¹ At a minimum, staying the case would eliminate
 8 the possibility of the state and federal courts both deciding, and possibly reaching
 9 inconsistent conclusions regarding, this key issue of default under the loan agreement.
 10 Moreover, where – as here – state law issues predominate, “[g]ranting the stay is. . .
 11 consistent with the federal court’s discretion to decline to exercise jurisdiction out of
 12 consideration for federal-state comity.” *El Centro Foods, Inc. v. Nazarian*, No.
 13 CV09-06395 ODW, 2010 U.S. Dist. LEXIS 49745, at *7 (C.D. Cal. Apr. 21, 2010) (citing
 14 *Colorado River*, 424 U.S. at 817).

15 Second, the state action adequately protects Plaintiff’s rights. The overwhelming
 16 majority of the claims at issue are state law claims. The only claim arising under federal
 17 law – Plaintiff’s claim for the federal remedy of maritime foreclosure – is likely dependent
 18 on the resolution of state law issues. Although this claim cannot be adjudicated in state
 19

20 ¹ For these reasons, the Court finds that the rule of decision is substantially one of
 21 state law. Plaintiff’s additional argument that 46 U.S.C. § 31322(b) preempts Defendants’
 22 usury claims in the state action does not alter this conclusion. Without addressing the merits
 23 of this position, the core claims at issue regarding the loan agreement remain ones of state
 24 law.

25 Nevertheless, this abstention factor regarding whether federal law provides the rule
 26 of decision on the merits remains neutral. “[T]he presence of state-law issues may weigh in
 27 favor of . . . surrender only in some rare circumstances.” *Travelers Indem.*, 914 F.2d at 1370
 28 (citation and quotations omitted). But see *Anderson v. Neibauer*, No., 09-cv-01446, 2011
 U.S. Dist. LEXIS 4525, at *23 (E.D. Cal. Jan. 18, 2011) (finding that state law state rule of
 decision supported dismissal under *Colorado River* without a separate finding of “rare
 circumstances” to support surrender); *Gallagher v. Dillon Group 2003-I*, No.
 CV-09-2135-SBA, 2010 U.S. Dist. LEXIS 33054, at *13 (N.D. Cal. Mar. 5, 2010) (same)
 (“[S]tate law predominately controls this case and the state cases, and the decision on the
 merits applying state law will subsume any decision on the federal claims. Thus, the fifth
Colorado River factor strongly supports the granting of the motion.”). The issues of state law
 in this case are routine and thus do not set forth the “rare circumstances” that the Ninth
 Circuit in *Travelers Indem.* required for a finding that this factor weighs in favor of abstention.
 See *Travelers Indem.*, 914 F.2d at 1370.

1 court, staying the federal action would not impact Plaintiff's ability to recover under federal
2 law. While the case is stayed and the state action proceeds, Plaintiff's rights will be
3 protected, as the vessel will remain under arrest and within the jurisdiction of this Court.

Third, although this factor weighs less strongly than those discussed above, the Court finds that the state action has priority over the instant case. The state action was filed approximately one month before the federal action, and such a time difference supports affording deference to the Superior Court. See *EI Centro Foods*, 2010 U.S. Dist. LEXIS 49745, at *7-8 (finding that “proper deference should be afforded to the Superior Court” where the state action was filed approximately one month before the federal action). While “priority is not measured exclusively in terms of which complaint was filed first, but rather in terms of how much progress was actually made in the state and federal actions,” *American International Underwriters, Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988) (emphasis added), the Court finds that its expedited case management plan notwithstanding, the federal action has not progressed to a point to alter this priority determination. The Court has decided only one substantive motion – denying Defendants’ motion to vacate the order of arrest, which, as discussed, is an issue exclusive to the federal action and which does not reach the merits of the parties’ claims. *C.f. id.* (noting that seven motions decided by the state court judge supported a finding that the state action had priority over the federal one). The discovery taken in the federal action can likely be used in the state action, see Cal Code Civ Proc § 2025.620(g), and although the Court has set a trial date, if the Court were to deny Defendant’s stay application, the trial date would be continued at least sixty days, as Defendants’ alternative request for leave to amend their answer, file counterclaims, conduct additional discovery, and extend scheduling order dates would have been granted.²

² For these reasons, it is speculative as to whether the federal action could be completed substantially sooner than state action. Even if that were the case, Plaintiff's argument that "prolonging the status quo would unduly prejudice Plaintiff" is questionable. (Opp. at 11) Plaintiff's payment of custodial fees is a consequence of its choice to seek an order of arrest of the vessel, although as set forth, *infra*, the Court will consider a mechanism to reduce this obligation if the state action is not moving promptly. Moreover, up to this point, Plaintiff has taken the position that the vessel was adequately maintained and could remain

1 The remaining abstention factors are neutral. Contrary to Plaintiff's argument that
 2 the arrest of the vessel supports denial of the stay, the Court finds this factor regarding
 3 jurisdiction over property unhelpful. For the reasons stated by Judge Carney, the
 4 principal objective of the parties' loan agreement and their current dispute is the
 5 borrowing of \$21 million. “[M]oney . . . is not the sort of tangible physical property
 6 referred to in *Colorado River*.¹” *Travelers Indem. Co.*, 914 F.2d at 1368 (quoting
 7 *American Int'l Underwriters*, 843 F.2d at 1258). The fact that Plaintiff seeks a remedy that
 8 involves foreclosure of property currently in control of the Court does not alter this
 9 conclusion.

10 Next, the Court finds that the two forums are equally convenient to the parties, as
 11 both are located in Southern California. Plaintiff's position that the Court should look not
 12 to the geographic distance between the forums but rather to which forum can “resolv[e]
 13 this dispute in a single action” (Opp. at 7) is unsupported by case law and not persuasive.
 14 *C.f. id.; American Int'l Underwriters*, 843 F.2d at 1258.

15 Finally, both parties contend that the other engaged in forum shopping. Neither
 16 position is convincing. The gravamen of Plaintiff's argument is that Defendants engaged
 17 in forum shopping by “preemptively” filing the state action after receiving a demand letter
 18 from Plaintiff's counsel. (Opp. at 12 (citing Pl. Ex. 1)) However, other than a reference to
 19 “commencing foreclosure proceedings against . . . the vessel,” nowhere in this letter does
 20

21 well maintained for “long-term arrests.” See Opp. Mot. to Vacate, Beaumont Decl. ¶ 2; see
 22 also *id.* at ¶ 3 (citing examples of long-term arrests of mega-yachts for over 12 month
 23 periods). Although the Court has serious concerns that will be addressed, *infra*, regarding
 24 the condition of the vessel while under arrest, the Court does not agree that the vessel's
 25 marginal deterioration in value over time directs the conclusion that the state court cannot
 26 protect Plaintiff's rights. The state court may (and hopefully will) decide this action on an
 27 expedited basis, and the Court will actively review the condition of the vessel while it remains
 28 under its jurisdiction and reserves the right to modify its orders appointing substitute
 custodian and of arrest. Finally, Plaintiff asserts that it is entitled to recover its \$15.5 million
 in principal as soon as possible, yet provides no authority as to why delayed financial
 recovery alone can preclude issuance of a stay, especially where, as here, Defendants have
 a claim for financial recovery in State court. Regardless, Plaintiff has not shown that it is
 disproportionately prejudiced by the status quo, as Defendants are deprived of use of the
 vessel as long as it remains under arrest. Indeed, minimizing the amount of time Defendants
 were deprived of use of the vessel while this matter was pending was a major consideration
 in setting an expedited case management schedule in the federal action.

1 Plaintiff's counsel state where the threatened litigation would be filed. (Pl. Ex. 1) Insofar
 2 as Plaintiff is arguing that Defendants improperly sought to avoid a federal forum, this
 3 position lacks merit, as federal courts do not have jurisdiction over Defendants' claims.
 4 See Def. Ex. C. Thus, there is no support for Plaintiff's position that Defendants' first-filed
 5 state action was an attempt to avoid Plaintiff's preferred forum. Defendants argue, in
 6 turn, that Plaintiff should have litigated this action in Orange County Superior Court and
 7 should not have filed an action in this Court. (Mem. at 10) However, Plaintiff correctly
 8 notes that it had to file an action in this court in order to enforce the maritime lien. See
 9 Fed. R. Civ. P. C(2). For these reasons, the Court finds that the forum shopping factor
 10 weighs neither for nor against abstention.

11 In sum, the avoidance of piecemeal litigation, federal-state comity, and adequacy
 12 of the state proceeding to protect the parties' rights strongly favor abstention. Other
 13 factors either favor abstention or are neutral. Accordingly, the Court finds the requisite
 14 exceptional circumstances present to merit a *Colorado River* stay.

15 **B. Plaintiff's Procedural Argument**

16 Plaintiff also asserts that Defendants' application should be denied on procedural
 17 grounds because Defendants' could have filed a noticed motion "as early as January 31,
 18 2011" and because Defendants failed to provide good cause for the twenty-four day delay
 19 in filing the instant application.³ (Opp. At 8) This argument is not persuasive. Plaintiff
 20 cites no authority for this position, and the Court is not aware of any case law, statute, or
 21 rule that would require denial of Defendants' application on the sole ground that it could
 22 have theoretically been filed twenty-four days earlier.

23 Additionally, Plaintiff has not shown how it would be harmed by the briefing
 24 schedule set by the Court. In setting this schedule, the Court sought to hear the
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26 ³ On February 18, 2011, Defendants contacted the Court to obtain a hearing date on
 27 a motion to stay this action. Because of this case's expedited case management schedule
 28 and pending deadlines, Defendants were instructed to file an ex parte application to obtain
 this relief. On February 23, 2011, Defendants filed the instant application, and the following
 day, the Court set a hearing date of March 18, 2011 and directed Plaintiff to respond by
 March 10, 2011.

1 application on an expedited basis, but still to provide Plaintiff with more time to respond
 2 than the minimum allotted under local rules. Accordingly, the Court provided Plaintiff with
 3 fifteen days to respond to the instant application. Had Defendants filed a noticed motion
 4 with a twenty-eight day hearing date, Plaintiff would have had fourteen days to respond.
 5 Local Rule 7.1(e). With this briefing schedule, Plaintiff is no worse a position than it
 6 would have been if a noticed motion was filed. Defendants' application will not be denied
 7 on procedural grounds.

8 **C. Maintenance Of The Vessel**

9 The Court has serious concerns about the condition of the vessel and its possible
 10 impact on the environment during a long-term arrest. While these concerns do not
 11 preclude the issuance of a stay at this time, the Court will take steps to ensure that the
 12 vessel remains properly and adequately maintained while it remains under the Court's
 13 jurisdiction. First, the Court orders that the parties appear before the Court every thirty
 14 days to provide a status update regarding the condition of the vessel. If the Court finds
 15 that the vessel poses any risk to the environment or that it is being maintained in a
 16 manner that risks substantial decline in value beyond what is to be expected from normal
 17 value loss over time, the Court may take actions that include modifying the order
 18 appointing substitute custodian and/or the order of arrest. Next, while the Court's
 19 abstention analysis is strongly influenced by concerns over federal-state comity, the Court
 20 respectfully requests that the Orange County Superior Court issue an expedited case
 21 management schedule that would allow it to decide this case as quickly as possible.
 22 Although speculation regarding the timing of when the Orange County Superior Court can
 23 decide the state action is not a determinative factor in the *Colorado River* analysis, the
 24 Court notes that an early determination of the state action will minimize the risks inherent
 25 in the arrest and maintenance of the 163-foot yacht.

26 **III. CONCLUSION**

27 For the above-stated reasons, Defendants' application to stay the federal action is
 28 **GRANTED**. The parties are ordered to file a status report regarding the state action every

1 three months from the day this order is filed and to immediately inform the Court upon a
 2 judgment in that action. The parties are further ordered to appear before this Court on
 3 May 4, 2011 at 2 p.m. for a status conference regarding the condition of the vessel. The
 4 parties' motions for summary judgment [dock. # 57, 58] are **DENIED** as premature.
 5 Motions for summary judgment, if appropriate, may be re-filed after the stay is lifted.

6 Notwithstanding the Court's granting of the stay, the Court is concerned with
 7 prejudice to Plaintiff by having to pay the continuing maintenance fees of approximately
 8 \$30,000 per month. Clearly, if the stay were denied, Plaintiff would continue to have this
 9 obligation until after the trial and until a final judgment in this case. Given the likelihood
 10 that the trial would have been continued to mid-July to accommodate Defendants'
 11 counterclaims, a final judgment would not be likely until late August, at the earliest. If the
 12 state action is not moving promptly, Plaintiff may seek an order of the Court that the stay
 13 continue only on condition that Defendants pay half the costs of maintaining the vessel.
 14 Since the stay is sought by Defendants and that stay will materially increase the expense
 15 to Plaintiffs, it seems only fair that Defendants should bear part of the costs incurred.
 16 Plaintiff may seek such relief if the state proceeding does not appear to be on track for
 17 resolution at a time in the foreseeable future.

18 The Court excepts from the stay settlement conferences before the magistrate
 19 judge, which shall proceed at such time as the magistrate judge sets or as requested by
 20 the parties.

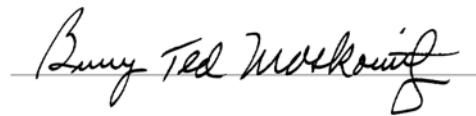
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22 **IT IS SO ORDERED.**

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DATED: April 11, 2011

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Honorable Barry Ted Moskowitz
United States District Judge

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